federal criminal statute," out of deference to congressional prerogative and the need for "fair warning." *See Arthur Andersen v. United States*, 125 S.Ct. 2129, 2134 (2005) (quotation omitted). The Government asserts that "the rule that antitrust exemptions must be construed narrowly has been applied in both civil and criminal cases," but has identified not one criminal case construing a statutory exemption narrowly. U.S. Br. 20 (citing note 14). So far as petitioners are aware, this Court has *never* applied the rule in a criminal prosecution. *See* Cert. Petn. at 21 & n.6.

The Government further argues that *Arthur Andersen*'s concern for "fair notice" does not apply because the stipulated facts do not provide that petitioners "knew about or relied on *Tucor* in entering into their agreement to fix through rates." U.S. Br. 20-21. Nothing in *Arthur Andersen* requires a criminal defendant to show actual reliance on an alternative interpretation. Rather, "fair notice" presents the objective question of whether a reasonable observer could have believed its conduct lawful. Here, where the statute at a minimum is ambiguous, and the only Court of Appeals to have ruled held that the charged conduct was exempt from the antitrust laws, petitioners plainly have shown an entitlement to a narrow construction of the criminal law.

b. Finally, the Government does not dispute that *Hoffman-La Roche*, 124 S. Ct. at 2366, requires that courts "construe[] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations," and that the Fourth Circuit made no such accommodation here. Yet the Government tries to distinguish the case because of the United States' "strong sovereign interest in protecting the competitive process that DOD uses." U.S. Br. 18. The Government's financial interest is besides the point, however, because it remains the same no matter whether the Government is the direct victim of domestic shippers or an indirect victim of foreign agents. Congress indisputably has determined that out of respect for the sovereignty of foreign nations, a foreign conspiracy—even one that might affect the

Government or U.S. citizens—remains within the exclusive jurisdiction of the foreign antitrust authorities.

The question here is not whether Congress has the power to criminalize the conduct at issue—it clearly could do so. The question rather is whether the *Executive Branch* may override Congress' express judgment to leave this conduct to the regulation of foreign sovereigns. *Hoffman-LaRoche* recognized the conflicts from parallel antitrust enforcement actions: "even where nations agree about primary conduct, say price fixing, they disagree dramatically about appropriate remedies," *Hoffman-LaRoche*, 124 S. Ct. at 2368. In its amicus brief, the Government of Belgium here further explains the manifest conflicts between American and European antitrust laws in its amicus brief. *See also* Cert. Petn. 26-28. The Court of Appeals ignored these comity principles in the decision below, and the Department of Justice has demonstrated, both here and in *Tucor*, that it remains tone deaf to their music as well. To honor the legislative judgment and to avoid future interference with foreign antitrust cases, certiorari is warranted.[3]

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of *certiorari*.

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[3] The Government opposes certiorari on the fraud count because the SOF supposedly contains independent facts to support the offense, yet the Government never identifies those facts. U.S. Br. 21. Indeed, the SOF states only that petitioners provided "misleading" information to the DOD to "increas[e] the rates paid by DOD." App. 67a. These summary conclusions depend on the illegality of the underlying conspiracy, and thus the charge should stand or fall with the antitrust charge. The Court of Appeals never addressed the issue, but to ensure that it is preserved, petitioners request certiorari over this issue as well. In any event, petitioners would be sentenced separately on the fraud charge. Therefore, even if the Court did not find this issue cert-worthy, it does not pose an independent bar to review.

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IN THE

Supreme Court of the United States

GOSSELIN WORLD WIDE MOVING, N.V., AND THE PASHA GROUP, PETITIONERS

v.

UNITED STATES, RESPONDENT

On Petition For A Writ Of Certiorari To The United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE GOVERNMENT OF BELGIUM AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether provisions in the Shipping Act of 1984, which foreclose the application of U.S. antitrust laws to agreements and activities relating to the transportation of U.S. military household goods in foreign countries, should be interpreted in light of principles of prescriptive comity and the sovereign interests of other nations in regulating their own commerce.

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INTEREST OF *AMICUS CURIAE*

The Government of Belgium has a vital interest in this Court's review of the decision below, which would impermissibly interfere with the prerogative of Belgium and other European nations to regulate anticompetitive behavior within their borders. Belgium itself has a well-developed legal regime designed to protect against abuses of economic competition. Specifically, the Belgian Act on the Protection of Economic Competition ("Belgian Act") prohibits "agreements between undertakings ... and concerted practices whose object or effect is to significantly prevent, restrain or distort competition in the Belgian market concerned or in a substantial part of it." Belgian Act art. 2, § 1. The Belgian Act further prohibits "[a]ny abuse of a dominant position in the Belgian market concerned or in a substantial part of it by one or more undertakings." *Id.* art. 3.[1]

Belgium is also a Member State in the European Union ("EU"). In that capacity, Belgium provides political, economic, and enforcement support for the EU's competition laws, which, in conjunction with Member States' national laws, operate as a dual enforcement system in Europe. The Belgian Act provides for EU enforcement where unlawful restraints on trade fall within the jurisdiction of the European Community ("EC"). And, like Belgium, the EU vigorously prosecutes price-fixing, having levied €1.839 billion in fines during 2001 and €950 million during 2002. See *The Fight Against Cartels: Statistics*, available at http://europa.eu.int/comm/competition/citizen/cartel_stats.html.

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[1] The parties have consented to the filing of this brief; their letters of consent are on file with the Clerk. No counsel for any party has authored this brief in whole or in part, and the Belgian Movers Association has made a monetary contribution to its preparation and submission.

Belgium is likewise a member of the Organisation for Economic Co-operation and Development ("OECD"), which urges its members to coordinate the enforcement of their antitrust laws. In addition, Belgium's Competition Service actively participates in the European Competition Network, the International Competition Network, and the European Competition Authorities. See http://mineco.fgov.be/organization_market/competition/home_en.htm.

For all these reasons, Belgium has significant economic and political interests in ensuring that companies acting in Belgium and other European markets comply with Belgian and EU competition laws, and in preventing encroachment upon those enforcement efforts by other countries' laws. Thus, Belgium has a vital interest in ensuring that Belgian companies such as petitioner Gosselin World Wide Moving, N.V. ("Gosselin") are not subject to unreasonable extraterritorial applications of U.S. antitrust laws, including the Sherman Act, 15 U.S.C. § 1.

STATEMENT

This is a criminal antitrust case in which the United States charges that petitioners violated the Sherman Act, 15 U.S.C. § 1, by engaging in price-fixing in connection with moving services provided to the Department of Defense ("DoD"). Petitioners Gosselin, a Belgian company, and The Pasha Group ("Pasha"), a U.S. company, assert that their activity—the vast majority of which took place on foreign soil and is under criminal investigation by foreign antitrust officials—is immune from prosecution under the Shipping Act of 1984, 46 U.S.C. app. § 1701-1719.

The Government of Belgium agrees with petitioners' arguments, and files this brief to emphasize the importance of the issue presented here to the international community. In particular, this Court's review is urgently needed to prevent the decision below from jeopardizing the antitrust enforcement efforts of foreign authorities such as Belgium

and the European Community. The Fourth Circuit's reading of the Shipping Act undermines their ability to regulate their own commerce in ways that differ from that of U.S. officials. Moreover, foreign firms will be deterred from taking part in those jurisdictions' leniency programs if the firms' admissions can subject them to *criminal liability* in the United States.

A. The International Through Government Bill of Lading Program

Under the DoD's International Through Government Bill of Lading ("ITGBL") program, the Military Traffic Management Command ("MTMC") (now the Surface Deployment and Distribution Command) takes competitive bids from freight forwarders for moving the household goods of DoD personnel. There are five segments of service: (1) the carriage of goods between inland U.S. cities and U.S. ports; (2) U.S. port services; (3) ocean transport services; (4) foreign port services; and (5) the carriage of goods between foreign ports and foreign inland cities. The MTMC, however, takes unitary bids known as "through rates" for the entire process. Pet. App. 3a.

The lowest bid from any freight forwarder for a given route, or "channel," is called the "prime" through rate ("FF1"). The freight forwarder who makes the prime bid gets a set percentage of DoD business for that channel. In a second round of bidding, however, other freight forwarders can match FF1 by providing "me-too" rates. Those who match FF1 get a smaller set percentage of the business for that channel. Pet. App. 3a.

Petitioners are in the business of moving the household goods of DoD personnel from their German homes to ports in the United States. Accordingly, they contract with ocean common carriers and providers of foreign port and inland transportation services (segments 3-5 above) at a rate called a "landed rate." Because the ocean transport rate is set by a

conference of ocean carriers and amounts to a fixed cost, the competitiveness of petitioners' landed rate depends on the rates at which they subcontract with local foreign agents for moving services in the foreign segments (port, storage, and transportation services). Pet. App. 4a.

According to the agreed-upon facts, petitioners admit that in 2001 they agreed to participate with German moving agents in their decision not to service freight forwarders who made "me-too" bids on 12 separate channels. Petitioners informed these freight forwarders that the German agents would not contract with them if they matched the lowest (FF1) rate. When no one else matched its rate, the freight forwarder that submitted the low FF1 rate withdrew it, the other freight forwarders submitted bids at the second lowest rate, and as a result the DoD paid a higher rate for moving services on those 12 channels than it otherwise would have paid if the initial prime rate had held. Pet. App. 31-32a

Petitioners assert immunity from prosecution under the Shipping Act of 1984, which—principally out of respect for the interests of foreign nations—contains several grants of antitrust immunity. Most relevant here, the Shipping Act exempts from Sherman Act liability "any agreement or activity concerning the foreign inland segment of through transportation that is part of transportation provided in a United States import or export trade." 46 U.S.C. app. § 1706(a)(4).

B. The Decisions Below

The district court dismissed the indictment, primarily on the ground that "under a plain reading of Section 1706(a)(4) of the Shipping Act, Defendants' activity does 'concern' the foreign inland segment of through transportation." Pet. App. 26a. The court rejected the government's argument that § 1706(a)(4) was unavailable simply because the alleged conspiracy involved "contacts with the United States." *Id.* at